A

Sik Hong Photo Sdn Bhd v Ch'ng Beng Choo (suing for and on behalf of Ng Hua's estate, deceased)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NO P-02–412 OF 2004
LOW HOP BING, KANG HWEE GEE AND AZHAR MA'AH JJCA
3 FEBRUARY 2010

C

Contract — Breach — Fundamental breach — Sale and purchase of property — Total failure of consideration — Whether amounted to fundamental breach

D

Contract — Breach — Remedies — Rescission, right of — Whether respondent entitled to rescind contract under s 56 of the Contracts Act 1950 — Whether time of essence — Whether there was total failure of consideration — Contracts Act 1950 ss 40 & 56

E

Contract — Breach — Waiver of — Sale and purchase of property — Delay in completion — Whether acquiescence and waiver established

F

Contract — Sale and purchase of property — Delay in completion — Contract specified mandatory date of completion of sale — Whether time was of essence — Whether purchaser could rescind sale and purchase agreement for default of completion date — Contracts Act 1950 s 56(1)

G

Contract — Time of the essence — Sale and purchase of property — Contract specified mandatory date of completion of sale — Whether time was of essence — Whether purchaser could rescind sale and purchase agreement for default of completion date — Contracts Act 1950 s 56(1)

H

Contract — Uncertainty — Terms — Contract for sale of land — Consideration payable by way of transfer of shares in company — Date of transfer of consideration was to be deferred to unspecified date — Whether element of uncertainty in contract — Contracts Act 1950 s 30

I

The plaintiff/respondent and one Ch'ng Beng Leong, the managing director of the defendant, were the lawful daughter and son respectively of Madam Ng (deceased) and her husband Ch'ng Gim Chuan (deceased). The defendant/appellant was a family concern, of which Ch'ng Gim Chuan was

the chairman. During her lifetime, the late Madam Ng entered into a sale and purchase agreement ('SPA') with the defendant to sell a piece of land together with a premises erected thereon ('the property') to the defendant at a consideration of RM43,000, which was to be settled by a transfer to Madam Ng of the shares in the defendant ('the consideration') on or before 31 December 1980 ('the completion date'). Although the defendant had not transferred the consideration to Madam Ng, the defendant had already taken vacant possession of the property before the completion date. The defendant's chairman died on 17 January 1986 and the defendant passed two resolutions for the purpose of transferring the shares to Madam Ng. The defendant prepared and executed the transfer forms, but they were never sent to Madam Ng for execution. As there had never been any transfer of the shares, Madam Ng complained that the defendant had breached the SPA and demanded that vacant possession of the property be re-delivered to her, with an account for rentals. Upon the demise of Madam Ng, her daughter Ch'ng Beng Choo was substituted as the plaintiff. The plaintiff claimed that time was of the essence of the SPA. The defendant claimed that the plaintiff's conduct had shown acquiescence and, consequently, the plaintiff had waived the stipulation that time was the essence of the SPA. The learned judicial commissioner held that the SPA was null and void and ordered the return of property to the plaintiff and an account for rentals. Hence this appeal.

Held, dismissing the appeal with costs:

(1) Under cl 3 of the SPA, the parties had expressly stipulated and agreed on the date of completion. That stipulation was couched in peremptory language and required the mandatory completion of the sale and purchase on or before 31 December 1980. Hence, pursuant to cl 3, the parties had agreed that time was of the essence thereof (see para 15).

(2) On the facts, the court below was correct in holding that no acquiescence and waiver could be attributed to Madam Ng (see para 21).

(3) The defendant's failure to transfer the consideration (the shares) to Madam Ng constituted a total failure of consideration on the part of the defendant, in so far as the SPA was concerned. The defendant's failure or refusal to transfer the shares to Madam Ng on or before the completion date came squarely within the first limb of s 40 of the Contracts Act 1950 ('Act'). There was total non-performance by the defendant of the obligation relating to the transfer of the shares to Madam Ng under the SPA (see paras 23–24).

(4) The essence of time in the SPA came under s 56(1) of the Act and the failure of consideration was within the ambit of s 40 of the Act. Section 40 must be read conjunctively with s 56(1) when determining whether the defendant as a promisor had committed a breach of such a nature

that went to the root of the contract ie a fundamental breach. The transfer of the consideration was a 'fundamental term', a breach of which constituted a fundamental breach. That fundamental breach entitled Madam Ng to rescind the contract and to have the parties restored to a position where they would stand as if the SPA had never been made ie the return of the property by way of restitutio in integrum to Madam Ng, and, upon her death, to her estate (see paras 26–27).

(5) There is at common law a right to rescind a contract in very limited circumstances. In essence, it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration (see para 28).

(6) The defendant's contention, that Madam Ng had, by acquiescence, agreed that the transfer of the shares to her was to be deferred to an unspecified date, clearly militated against its own case. That contention unequivocally led to the result that the date of the transfer was to be kept at large or postponed ad infinitum. The words 'to be deferred to an unspecified date' created an element of uncertainty in the contract, and so s 30 was to be invoked (see para 30).

[Bahasa Malaysia summary

Plaintif/responden dan Ch'ng Beng Leong, pengarah urusan defendan, merupakan anak perempuan sah Madam Ng (meninggal dunia) dan suaminya Ch'ng Gim Chuan (meninggal dunia). Defendan/perayu merupakan urusan keluarga yang mana Ch'ng Gim Chuan adalah pengerusinya. Semasa hayatnya, mendiang Madam Ng menandatangani suatu perjanjian jual beli ('SPA') dengan defendan untuk menjual sebidang tanah bersama dengan premis di atasnya ('hartanah tersebut') kepada defendan dengan balasan wang sejumlah RM43,000 yang harus disempurnakan menerusi penyerahan saham-saham defendan kepada Madam Ng ('balasan tersebut') pada atau sebelum 31 Disember 1980 ('tarikh penyempurnaan'). Walaupun defendan tidak menyerahkan balasan tersebut kepada Madam Ng, defendan telah mengambil milikan kosong hartanah tersebut sebelum tarikh penyempurnaan. Pengerusi defendan meninggal dunia pada 17 Januari 1986 dan defendan meluluskan dua resolusi bagi tujuan menyerahkan saham-saham tersebut kepada Madam Ng. Defendan menyediakan dan melaksanakan borang-borang penyerahan tersebut, tetapi borang-borang itu tidak pernah dihantar kepada Madam Ng untuk dilaksanakan. Kerana tiada penyerahan saham-saham tersebut, Madam Ng mendakwa bahawa defendan telah melanggar SPA tersebut dan menuntut milikan kosong hartanah tersebut diberikan semula kepadanya, dan juga akaun sewaan. Setelah Madam Ng meninggal dunia, anak perempuannya Ch'ng Beng Choo digantikan sebagai plaintif. Plaintif mendakwa bahawa masa merupakan intipati SPA tersebut. Defendan pula mendakwa bahawa tindakan plaintif menunjukkan persetujuan, dan akibatnya plaintif telah

mengetepikan syarat bahawa masa merupakan intipati SPA tersebut. Pesuruhjaya kehakiman yang bijaksana memutuskan bahawa SPA tersebut batal dan tak sah dan memerintahkan pemulangan hartanah tersebut kepada plaintif dan akaun sewaan. Justeru rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Di bawah klausa 3 SPA, pihak-pihak nyata mensyaratkan dan bersetuju atas tarikh penyempurnaan. Syarat tersebut diungkapkan dalam bahasa yang mesti dipatuhi dan mengkehendaki penyempurnaan mandatori jual beli tersebut pada atau sebelum 31 Disember 1980. Maka, berikutan klausa 3, pihak-pihak bersetuju bahawa masa merupakan intipati (lihat perenggan 15).

(2) Atas fakta, Mahkamah Tinggi memutuskan dengan tepat bahawa tiada persetujuan dan pengetepian yang dibuat oleh Madam Ng (lihat perenggan 21).

(3) Kegagalan defendan menyerahkan balasan tersebut (saham-saham itu) kepada Madam Ng merupakan kegagalan balasan di pihak defendan dalam melaksanakan SPA tersebut. Kegagalan defendan atau keengganannya menyerahkan saham-saham tersebut kepada Madam Ng pada atau sebelum tarikh penyempurnaan tertakluk dalam s 40 Akta Kontrak 1950. Defendan langsung tidak melaksanakan kewajipannya untuk menyerahkan saham-saham tersebut kepada Madam Ng di bawah SPA tersebut (lihat perenggan 23–24).

(4) Kepentingan masa dalam SPA tersebut adalah di bawah s 56(1) Akta dan kegagalan balasan terangkum di bawah s 40 Akta. Seksyen 40 mestilah dibaca bersama s 56(1) apabila menentukan sama ada defendan sebagai orang yang berjanji telah melakukan pelanggaran perkara yang membentuk akar umbi kontrak tersebut, iaitu pelanggaran asasi. Penyerahan balasan tersebut merupakan 'terma asasi', yang mana pelanggarannya akan membentuk pelanggaran asasi. Pelanggaran asasi tersebut memberi hak kepada Madam Ng membatalkan kontrak tersebut dan mengembalikan kedudukan pihak-pihak kepada sebelum SPA tersebut ditandatangani, iaitu pengembalian hartanah tersebut secara *restitutio in integrum* kepada Madam Ng, dan apabila dia meninggal dunia, kepada estetnya (lihat perenggan 26–27).

(5) Terdapat hak untuk membatalkan kontrak di bawah *common law* dalam keadaan-keadaan yang terhad. Pada dasarnya, ia adalah remedi kuasi-kontraktual dalam kes-kes di mana berlakunya kegagalan balasan (lihat perenggan 28).

(6) Hujah defendan bahawa Madam Ng, melalui keakurannya, telah bersetuju bahawa penyerahan saham-saham tersebut kepadanya dilaksanakan pada tarikh yang tidak ditetapkan, jelas menjejaskan

kesnya sendiri. Hujahannya nyata menunjukkan bahawa tarikh penyerahan tersebut tidak ditentukan atau ditangguhkan *ad infinitum*. Ayat-ayat 'to be deferred to an unspecified date' mewujudkan elemen ketidakpastian dalam kontrak tersebut, maka s 30 terpakai (lihat perenggan 30).]

Notes

For a case on remedies, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2747.

For cases on delay in completion, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5074–5079.

For cases on fundamental breach, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2689–2694.

For cases on terms, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5527–5528.

For cases on waiver of, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2807–2810.

Cases referred to

Barr's Contract, Re; Moorwell Buildings Ltd v Barr & Anor [1956] Ch 551 (refd)

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Brickles v Snell [1916] 2 AC 599, PC (refd)

Chia See Yin & Ors v Yeoh Kooi Imm [1996] 2 MLJ 494; [1997] 5 CLJ 111, HC (refd)

Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308; [1988] 1 LNS 213, HC (refd)

Compton v Bagley [1892] 1 Ch 313 (refd)

Chintamanie Ajit v Joseph Mootoo Sammy [1967] 1 AC 255, PC (refd)

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, HL (refd)

Green v Sevin (1879) 13 Ch D 589 (refd)

Hare v Nicoll [1966] 2 QB 130, CA (refd)

Harold Wood Brick Co Ltd v Ferris [1935] 2 KB 198, CA (refd)

Hudson v Temple (1860) 29 Beav 536 (refd)

King's Motors (Oxford) Ltd v Lax & Anor [1969] 3 All ER 665 (refd)

Law Ngei Ung v Tamansuri Sdn Bhd [1989] 2 CLJ 181, HC (refd)

Lock v Bell [1931] 1 Ch 35 (refd)

MacBryde v Weekes (1856) 22 Beav 553 (refd)

Mistaria Sdn Bhd v Evergreen Furniture Industries Sdn Bhd [1999] 4 MLJ 99, HC (refd)

Mussen v Van Diemen's Land Co [1938] Ch 253 (refd)

Photo Production Ltd v Securicor Transport Ltd [1980] 2 WLR, HL (refd)

Reuter v Sala (1879) 4 CPD 239 (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151; [1983] CLJ 363 (Rep), FC (refd)
Smith v Hamilton [1951] Ch 174 (refd)
Smith v Morgan [1971] 2 All ER 1500, Ch D (refd)
Steedman v Drinkle & Anor [1916] 1 AC 275, PC (refd)
Stickney v Keeble & Anor [1915] AC 386, HL (refd)
Tan Yang Loong & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289; [1992] 1 CLJ 211, HC (refd)
United Scientific Holdings Ltd v Burnley Borough Council Cheapside Land Development Co Ltd & Anor v Messels Service Co [1978] AC 904, HL (refd)
Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd [1996] 2 MLJ 81, CA (refd)
Zainal Abidin v Century Hotel Sdn Bhd [1987] 1 MLJ 236, SC (refd)

Legislation referred to

Companies Act 1965
Contracts Act 1950 ss 40, 56(1), 66

Appeal from: Civil Suit No 22–251 of 1989 (High Court, Pulau Pinang)

Hardeep Singh (Richard Huang with him) (Peter Huang & Richard) for the appellant.
Daphne Choy (Choy & Associates) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] After a full trial, the learned judicial commissioner gave judgment for the respondent ('the plaintiff'), declaring that the sale and purchase agreement ('the SPA') executed between the plaintiff and the appellant, a company incorporated under the Companies Act 1965 ('the defendant') on 31 October 1980 was null and void. There were also consequential orders for the return of property to the plaintiff and an account for rentals commencing 31 December 1980.

[2] On appeal, the High Court judgment was affirmed by us.

[3] We now provide our grounds.

DEFENCE

[4] In essence, the defendant's amended defence is that:

(a) Madam Ng Hua ('Madam Ng') had consented to and/or, by

A acquiescence, agreed that the transfer of fully paid 430 shares ('the shares') to her was to be deferred to an unspecified date;

(b) the defendant was ready to perform its obligations under the SPA; and

B (c) in 1987, the defendant had prepared the transfer forms to transfer the shares to Madam Ng.

UNDISPUTED FACTS

C **[5]** The plaintiff and one Ch'ng Beng Leong, the managing director of the defendant, are the lawful daughter and son respectively of Madam Ng (deceased) and her husband Ch'ng Gim Chuan (deceased). The defendant is a family concern, of which Ch'ng Gim Chuan (deceased) was the chairman.

D **[6]** During her lifetime, the late Madam Ng entered into 'the SPA' with the defendant to sell the land together with the premises erected thereon at No 56, Kinta Lane, Penang, ('the property') to the defendant at a consideration of RM43,000, which was to be settled by a transfer to Madam Ng of the E shares in the defendant at RM100 per share ('the consideration') on or before 31 December 1980 ('the completion date').

[7] Although the defendant had not transferred the consideration to F Madam Ng, the defendant had already taken vacant possession of the property before the completion date.

[8] The defendant's chairman died on 17 January 1986 and the defendant passed two resolutions for the purpose of transferring the shares to Madam G Ng. The defendant prepared and executed the transfer forms, but they were never sent to Madam Ng for execution. As there had never been any transfer of the shares, Madam Ng complained that the defendant had breached the SPA and demanded that vacant possession of the property be re-delivered to her, with an account for rentals.

H

[9] Upon the demise of Madam Ng (who had initiated the action herein), her daughter Ch'ng Beng Choo was substituted as the plaintiff.

I TIME OF THE ESSENCE

[10] Defendant's learned counsel, Mr Hardeep Singh (assisted by Mr Richard Huang) argued, inter alia, that time was not of the essence of the SPA.

[11] Ms Daphne Choy submitted for the plaintiff that time was of the essence as the parties have expressly agreed on the completion date in the SPA.

[12] The learned judicial commissioner had sustained the plaintiff's submission.

[13] In the instant appeal, the question for determination under this head revolves around the true construction of the SPA in order to determine whether time was of the essence thereof.

[14] On this issue, it is useful for us to set out the relevant principles as follows:

(a) The expression 'time is of the essence' means that a breach of the condition as to the time for performance will entitle the innocent party to consider the breach as a repudiation of the contract: *Halsbury's Laws of England*, (Vol 4) at para 1179.

(b) Section 56(1) of the Contracts Act 1950 provides that 'When a party to a contract promises to do a certain thing at or before a certain time or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract'. In other words, a stipulation as to time is of the essence of the contract if the parties so agree: *Chia See Yin & Ors v Yeoh Kooi Imm* [1996] 2 MLJ 494; [1997] 5 CLJ 111 (HC), per Abdul Malik Ishak J (now JCA) at p 120 who referred to *Steedman v Drinkle & Anor* [1916] 1 AC 275; *Brickles v Snell* [1916] 2 AC 599; *Mussen v Van Diemen's Land Co* [1938] Ch 253 and *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198. See also *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151; [1983] CLJ 363 (Rep) at p 366 (FC); and *United Scientific Holdings Ltd v Burnley Borough Council Cheapside Land Development Co Ltd & Anor v Messels Service Co* [1978] AC 904 at pp 940 and 944 (a reference hereinafter to a section is a reference to that section in the Contracts Act 1950, unless otherwise stated).

(c) Where time was not incorporated as the essence of the contract but in due course it has been made part and parcel of the contract by one party giving a notice to the other, after the party has been guilty of unreasonable delay and it follows, as the night the day, that the time mentioned in the notice must be reasonable: per Abdul Malik Ishak J (now JCA) in *Chia See Yin; Green v Sevin* (1879) 13 Ch D 589; *Compton v Bagley* [1892] 1 Ch 313; *Stickney v Keeble & Anor* [1915] AC 386; *Smith v Hamilton* [1951] Ch 174 and *Re Barr's Contract; Moorwell*

Buildings Ltd v Barr & Anor [1956] Ch 551. What is reasonable is a question of fact, and six days may be said to be reasonable: *Chintamanie Ajit v Joseph Mootoo Sammy* [1967] 1 AC 255.

(d) Where, from the nature of the contract, time may be said to be the essence thereof, for example:

(i) mercantile contracts (*Reuter v Sala* (1879) 4 CPD 239 at p 249);

(ii) contracts for the sale of leaseholds (*Hudson v Temple* (1860) 29 Beav 536 at p 534);

(iii) an option to buy shares which fluctuate in value (*Hare v Nicoll* [1966] 2 QB 130);

(iv) a colliery business (*MacBryde v Weekes* (1856) 22 Beav 553); and

(v) a public house as a going concern (*Lock v Bell* [1931] 1 Ch 35). See also *Chia See Yin* per Abdul Malik Ishak J (now JCA).

[15] Bearing in mind the above principles, we note that in the instant appeal, the consideration for the property was to be fulfilled by the transfer of the shares, and cl 3 of the SPA expressly provides that 'The sale and purchase shall be completed on or before 31st day of December 1980'. It is abundantly clear to us that under cl 3, the parties have expressly stipulated and agreed on the date of completion. That stipulation was couched in peremptory language, and required the mandatory completion of the sale and purchase on or before 31 December 1980. The intention of the parties was to complete the sale and purchase of the property on or before 31 December 1980. Hence, we hold that pursuant to cl 3, the parties have agreed that time was of the essence thereof.

ACQUIESCENCE AND WAIVER

[16] The next point put forward for the defendant was that the plaintiff's conduct had shown acquiescence and, consequently, the plaintiff had waived the stipulation that time was the essence of the SPA.

[17] It was stressed for the plaintiff that there was neither acquiescence nor waiver by the plaintiff in relation to the time.

[18] In our view, this issue of acquiescence and waiver is to be determined by reference to the evidence adduced at the trial. The finding of facts by the High Court revealed that in relation to the defendant's failure to transfer the shares to Madam Ng on or before the completion date, Ch'ng Beng Leong

('SD1') has given several contradictory versions vis:

(a) that during his lifetime, the late Ch'ng Gim Chuan had refused to transfer the shares to Madam Ng;

(b) that the late Ch'ng Gim Chuan had paid RM43,000 to Madam Ng;

(c) that the company's secretary, one Mr Kong Sin Heng, had not carried out his duties to effect the transfer at the material time; and

(d) that SD1 was waiting for the grant of letters of administration for the estate of Ch'ng Gim Chuan (deceased).

[19] To extricate himself from the melee of these contradictory versions, SD1 had created what he considered was the 'correct reason' ie the company secretary's dereliction of duties. As SD1 was obviously a witness who had a purpose of his own to serve, his contradictory versions had not been viewed favourably by the trial court.

[20] On the other hand, the letter dated 13 October 1987 issued to the defendant by Messrs Tan Bak Lee & Co, the (then) solicitors for Madam Ng, had notified the defendant that:

(a) the defendant was obliged to transfer the shares to Madam Ng on or before 31 December 1980;

(b) the defendant's failure to transfer the shares to the plaintiff has resulted in the breach of the SPA by the defendant; and

(c) the defendant was required to give an account for rentals of the property and to re-surrender vacant possession of the same to the plaintiff.

[21] Given the above scenario, we agree with the finding of the court below that no acquiescence and waiver could be attributed to Madam Ng.

[22] On the facts, the validity of the SPA could be impugned on grounds of failure of consideration and fundamental breach, in addition to uncertainty of contract. These grounds deserve a more detailed discussion below.

FAILURE OF CONSIDERATION AND FUNDAMENTAL BREACH

[23] The defendant's failure to transfer the consideration (the shares) to Madam Ng constitutes a total failure of consideration on the part of the defendant, in so far as the SPA is concerned. The defendant had never parted with the consideration for the property, and so the contract expressed in the

SPA attracts the application of the first limb of s 40 (but not the exception thereto). Section 40 merits reproduction in extenso as follows:

> 40 Effect of refusal of party to perform promise wholly
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

[24] The defendant's failure or refusal to transfer the shares to Madam Ng on or before the completion date came squarely within the first limb of s 40. Madam Ng has received nothing that she has bargained for in the SPA. There was total non-performance by the defendant of the obligation ie the promise relating to the transfer of the shares to Madam Ng under the SPA. Madam Ng, being the promisee, may put an end to the SPA, and the defendant should not be unjustly enriched under the SPA by retaining the property.

[25] An illustration of a total failure of consideration is to be found in *Mistaria Sdn Bhd v Evergreen Furniture Industries Sdn Bhd* [1999] 4 MLJ 99 (HC), where not a single sen has been paid towards the purchase consideration for the sale and purchase agreement of a business and the shareholders agreement.

[26] The essence of time in the SPA comes under s 56(1) and the failure of consideration is within the ambit of s 40. Section 40 must be read conjunctively with s 56(1) when determining whether the defendant as a promisor has committed a breach of such a nature that goes to the root of the contract ie a fundamental breach: *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, per Zulkefli Makinudin FCJ at p 277D; and per Gopal Sri Ram FCJ at p 286H. The words 'his promise in its entirety' in s 40 are singularly significant, as the non-defaulter's right to repudiate a contract accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of the promise: per Gopal Sri Ram FCJ in *Berjaya Times Square* at p 286A–B.

[27] Under the SPA, the defendant has the contractual obligation to perform ie to transfer the shares to Madam Ng on or before 31 December 1980. The defendant's non-performance of that obligation struck at the very root, foundation or substratum of the SPA. The transfer of the consideration is a 'fundamental term', a breach of which constitutes a fundamental breach ie the failure by one party (the defendant) to perform a primary obligation which has the effect of depriving the other party (Madam Ng) of substantially the whole benefit which it was the intention of the parties that she should obtain from the SPA: see *Photo Production Ltd v Securicor Transport Ltd*

[1980] 2 WLR 283 (HL) per Lord Diplock at p 294. The defendant's fundamental breach had deprived Madam Ng of the fundamental benefits under the SPA. That fundamental breach entitled the innocent party (Madam Ng) to rescind the contract and to have the parties restored to a position where they will stand as if the contract (the SPA) had never been made ie the return of the property by way of restitutio in integrum to Madam Ng (see *Berjaya Times Square Sdn Bhd* at p 281B per Gopal Sri Ram FCJ), and, upon her death, to her estate.

[28] There is at common law a right to rescind a contract in very limited circumstances. In essence, it is the quasi-contractual remedy of restitution in cases where there has been a total failure of consideration: *Berjaya Times Square Sdn Bhd* per Gopal Sri Ram FCJ at p 282I (FC), applying *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) per Viscount Simon LC at p 48.

[29] The common law right to rescind and the quasi-contractual remedy of restitution have been applied in:

(a) *Chye Fook & Anor v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; [1988] 1 LNS 213: a house purchaser had entered into an agreement with the developer who was to complete the house within 24 months but at the material time the developer had not constructed the building. The developer had not done any of the things it had promised to do within the time specified in the contract. The High Court granted the equitable remedy of rescission in favour of the purchaser.

(b) *Tan Yang Loong & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289; [1992] 1 CLJ 211 (HC): several purchasers had, pursuant to an agreement to purchase a house with vacant possession within 36 months from the date of the agreement, made payments to the developer. The developer had never constructed the house at all, and had failed or refused to perform his promise in its entirety within the 36 months, even until the date of the trial of the purchasers' action. Shankar J (as he then was) followed Chye Fook & Anor, and held that there was a total failure of consideration, and granted the purchasers' claim for a declaration that they were no longer bound by the agreement, with a consequential order, inter alia, for a refund of the sums paid by them.

(c) *Law Ngei Ung v Tamansuri Sdn Bhd* [1989] 2 CLJ 181 (HC): there was an abandonment of the project by the developer due to the developer's failure to complete the complex in which the purchaser had purchased a shop lot. The High Court granted rescission by reason of total failure of consideration and directed a restitutio in integrum by way of a

refund of the monies the purchaser had paid the developer.

UNCERTAINTY IN CONTRACT

[30] The defendant's contention, that Madam Ng had, by acquiescence, agreed that the transfer of the shares to her was to be deferred to an unspecified date, clearly militates against its own case. That contention unequivocally leads to the result that the date of the transfer was to be kept at large or postponed ad infinitum. The words 'to be deferred to an unspecified date' create an element of uncertainty in the contract, and so s 30 is to be invoked. This section reads as follows:

> 30 Agreements void for uncertainty
>
> Agreements, the meaning of which is not certain, or capable of being made certain, are void.

[31] Illustrations of agreements which have been rendered void on grounds of uncertainty include:

(a) *King's Motors (Oxford) Ltd v Lax & Anor* [1969] 3 All ER 665, where Burgess V-C held that an option clause in a lease for a further term 'at such rental as may be agreed upon between the parties', in the absence a relevant arbitration clause, and in the absence of agreement between the parties, was void for uncertainty (see also *Smith v Morgan* [1971] 2 All ER 1500 at p 1504 per Brightman J).

(b) *Zainal Abidin v Century Hotel Sdn Bhd* [1987] 1 MLJ 236 (SC): a similar option clause appeared in a tenancy agreement. Seah SCJ (as then was), speaking for the (then) Supreme Court, held that the option clause did not give rise to any legal obligation on the part of either party unless and until the lessee gives notice in writing to the lessor, within the stipulated period, of his intention to extend the lease and the parties have mutually agreed to the new rent. *Until these two conditions are satisfied, the option clause could not be legally enforced against the lessor*.

(c) *Wisma Sime Darby Sdn Bhd v Wilson Parking (M) Sdn Bhd* [1996] 2 MLJ 81 (CA): the focal point there revolves around a similar option clause in the written three-year tenancy agreement for a car park. The tenant gave notice in writing within the stipulated period of the intention to exercise the option to renew the tenancy but made no mention of the rental for the proposed new term. Eventually, in response to the landlord's invitation to make an offer in respect of the rental in competition with others who had been invited to tender for the tenancy, the tenant made an offer. The tenant's tender was not accepted and the existing lease was extended for two months to enable the tenant to wind up the car park operations. The landlord then issued

a writ seeking a declaration that the tenancy had been lawfully determined, vacant possession and damages. The High Court dismissed the landlord's action. In allowing the landlord's appeal, VC George JCA (as he then was) speaking for this court followed *King's Motors (Oxford) Ltd* and *Zainal Abidin*, and held, inter alia, that the option clause for a further term at 'a rent to be agreed' was void for uncertainty as the agreement provided no machinery or formula which the courts can utilise to ascertain what is otherwise unascertainable without the parties coming to an agreement.

[32] In the instant appeal, our finding that the SPA is void would brings into focus s 66 which provides for the obligation of the defendant, as the person who has received advantage under the SPA, as follows:

66 Obligation of person who has received advantage under void agreement, or contract that becomes void

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[33] Section 66 specifies the remedy of restitution or compensation in favour of Madam Ng. The defendant having taken possession of the property and having been in occupation thereof is legally bound to restore it, or to make compensation for it, to Madam Ng from whom the defendant had received the property.

CONCLUSION

[34] By reason of the above, this appeal was devoid of merits and dismissed with costs of RM5,000 to the plaintiff. The decision of the learned judicial commissioner was affirmed. Deposit to the plaintiff on account of the fixed costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum